No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose mission is to restore the principals of the American Founding to their rightful, preeminent authority in our national life. The Center advances that mission by working to restore the Constitution's structural protections of our liberty, such as the separation of powers and the limits inherent in the grant of specifically enumerated powers.[1]

This Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has eroded these structural protections by allowing unelected, unaccountable agencies to wield vast amounts of legislative and judicial power. As the decision below demonstrates, the result of *Chevron* deference is a titanic administrative state that is inconsistent with the Constitution's separation of powers.

The Institute's senior scholars have been at the forefront of addressing the conflict between the modern administrative state and the separation of powers in their academic writings. *See, e.g.*, John A. Marini, *The Politics of Budget Control: Congress, the Presidency, and the Growth of the Administrative State* (1992); Charles R. Kesler, *Separation of*

[1] All parties have granted blanket consent to the filing of *amicus curiae* briefs. *See* Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity other than the Center, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. *See* Rule 37.6.

Powers and the Administrative State, in The Imperial Congress: Crisis in the Separation of Powers (Gordon S. Jones & John A. Marini eds. 1989); *see also* R.J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, Soc. Phil. & Pol'y, Jan. 2007, at 16. And the Center has been at the forefront of raising these issues as *amicus curiae* in several cases before this Court, including *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Michigan v. EPA*, 135 S. Ct. 2699 (2015); and *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). Given the Center's expertise in these matters, the Center believes that the Court would benefit from considering its views.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Constitution identifies three types of governmental power, and vests them in three different branches of government. Specifically, the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," Art. I, § 1; the "executive Power shall be vested in a President of the United States," Art. II, § 1, cl. 1; and the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," Art. III, § 1.

These grants of power are exclusive—a branch can neither "arrogate power to itself" nor "impair another [branch] in the performance of its constitutional duties." *Loving v. United States*, 517

U.S. 748, 757 (1996). Accordingly, this Court has invalidated encroachments on the legislative power, *see, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); the executive power, *see, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); and the judicial power, *see, e.g.*, *Stern v. Marshall*, 564 U.S. 462 (2011).

The Framers understood that this "separation of governmental powers into three coordinate Branches is *essential* to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (emphasis added). As James Madison explained, "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty" than the separation of powers. The Federalist No. 47, at 298 (C. Rossiter ed. 1961). Indeed, in Madison's view, the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny." *Id.*

Judging by that standard, the modern administrative state has become far more of a threat to the separation of powers than the Framers could have imagined. Administrative agencies routinely "exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington v. FCC*, 569 U.S. 290, 312–13 (2013) (Roberts, C.J., dissenting). Moreover, the "accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of

modern American government." *Id.* at 313. This combination of legislative, executive, and judicial power has not yet reached "the very definition of tyranny," but "the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 315.

This Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), exacerbates these problems. *Chevron* requires courts "to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). This rule is based on a presumption of congressional intent: namely, that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in [a] statute," even if "Congress did not actually have an intent as to a particular result." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

But *Chevron*'s presumption about congressional intent "is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring). And *Chevron* distorts the separation of powers by permitting administrative agencies "to swallow huge amounts of core judicial and legislative power ... in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Id.* at 1149. By consolidating legislative, executive, and judicial power in the same hands, *Chevron* deference is undoubtedly a "powerful weapon in an agency's regulatory

arsenal." *City of Arlington*, 569 U.S. at 314 (Roberts, C.J., dissenting).

The decision below illustrates the corrosive effect that *Chevron* has on the separation of powers. Emboldened by *Chevron*, the Fish and Wildlife Service rewrote clear statutory text to give itself the power to designate as "critical habitat" virtually any part of the United States. The Fifth Circuit panel then abdicated its judicial responsibility to "say what the law is," instead deferring to the Service's interpretation without doing *any* meaningful analysis of the statutory text. The result is an administrative agency wielding vast amounts of legislative and executive power, without the meaningful check of judicial review.

In recent years, multiple justices have raised "serious questions about the constitutionality of [the Court's] broader practice of deferring to agency interpretations of federal statutes." *Michigan*, 135 S. Ct. at 2712–14 (Thomas, J., concurring); *accord Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). The Center believes that the Court should address these questions and hold that *Chevron* deference violates the separation of powers. At the very least, however, the Center believes that the Court should take steps to mitigate *Chevron*'s most pernicious effects.

ARGUMENT

I. *Chevron* deference undermines the separation of powers by allowing unelected, unaccountable agencies to wield vast amounts of legislative and judicial power.

Chevron requires courts "to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." *Michigan*, 135 S. Ct. at 2707. This rule is based on the presumption that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in [a] statute," even if "Congress did not actually have an intent as to a particular result." *Mead*, 533 U.S. at 229.

So understood, *Chevron* undermines the separation of powers in two ways. First, by giving agencies the power to speak with the "force of law," *Chevron* improperly transfers legislative power to those agencies. Second, by requiring courts to defer to an agency's interpretation of the law, *Chevron* improperly transfers judicial power to those same agencies.

A. Chevron's *delegation of policymaking authority to administrative agencies unlawfully places the power to make law and the power to enforce it in the same hands.*

In *Chevron*, this Court held that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). When

filling those gaps, agencies generally ask whether "there is a colorable interpretation that will support the policy result that the agency wants to reach," rather than searching for "the best objective interpretation of the statute." Raymond M. Kethledge, *Ambiguity and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017). Thus, *Chevron* presumes that, when a statute contains an ambiguity, Congress intended to give the agency the power to make policy with "the force of law." *Mead*, 533 U.S. at 229.

As an initial matter, *Chevron* did not identify any evidence that Congress actually intends to use statutory ambiguity as a way to delegate policymaking authority to agencies. And it would be difficult, if not impossible, to find such evidence because "Congress hardly ever states its instructions on the deference question with clarity." Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 Yale L.J. 1170, 1194 (2007). As a result, *Chevron* relies on a "fictional" intent, rather than one based on objective evidence, such as the statutory text. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989).

In addition, "*Chevron*'s inference about hidden congressional intentions seems belied by the intentions Congress has made textually manifest." *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorusch, J., concurring). For example, in the Administrative Procedure Act, Congress expressly provided that a "reviewing court shall decide all relevant questions of law" and "interpret constitutional and statutory

provisions." 5 U.S.C. § 706. But Congress said nothing—not a word—about its supposed intent to delegate policymaking authority to agencies. Thus, "*Chevron*'s claim about legislative intentions is no more than a fiction." *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring).

Even if the evidence supported *Chevron*'s claim about congressional intent, the delegation of policymaking authority to agencies would violate the separation of powers. When the Constitution was ratified, the public understood that "the formulation of generally applicable rules of private conduct" was part of the legislative power. *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring in the judgment); *accord Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). As a result, *Chevron*'s transfer of policymaking authority to agencies "permit[s] a body other than Congress to perform a function that requires an exercise of the legislative power." *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring).

To be sure, this Court has held that the delegation of policymaking authority violates the Constitution only if Congress fails to provide "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Mistretta*, 488 U.S. at 372. But it is "no small question whether *Chevron* can clear [that standard]." *Gutierrez-Brizuela*, 834 F.3d at 1154 (Gorsuch, J., concurring). As then-Judge Gorsuch explained, "if an agency can enact a new rule of general applicability affecting huge swaths of the national economy one day and reverse itself the next (and that is exactly what *Chevron* permits, *see* 467

U.S. at 857–59), you might be forgiven for asking: where's the 'substantial guidance' in that?" *Id.* "And if an agency can interpret the scope of its statutory jurisdiction one way one day and reverse itself the next (and that is exactly what *City of Arlington*'s application of *Chevron* says it can), you might well wonder: where are the promised 'clearly delineated boundaries' of agency authority?" *Id.* at 1154–55.

In practice, *Chevron* gives agencies the power to speak with the "force of law" on matters of policy without even the slightest guidance from Congress. This Court should therefore hold that *Chevron* unconstitutionally transfers legislative power from Congress to administrative agencies.

B. Chevron's *delegation of interpretive authority to administrative agencies prevents courts from exercising their judicial power to "say what the law is."*

In *Chevron*, this Court held that, if an agency's interpretation of an ambiguous statute is reasonable, courts must "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980. Thus, *Chevron* presumes that, when a statute contains an ambiguity, Congress intended to make the agency the "authoritative interpreter" of that statute. *Id.* at 983.

Once again, *Chevron* did not identify any evidence that Congress actually intends to use statutory ambiguity in this way. And *Chevron* actually *ignored* several provisions that flatly contradicted this presumption.

For example, in a provision titled "Scope of Review," the Administrative Procedure Act provides that "the reviewing court shall decide all relevant questions of law," 5 U.S.C. § 706, which "suggests de novo review of statutory issues." John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 194 (1998). In addition, the Act provides that "the reviewing court shall ... interpret constitutional and statutory provisions." 5 U.S.C. § 706. That "places the court's duty to interpret statutes on an equal footing with its duty to interpret the Constitution," which courts always review de novo. Duffy, *supra* at 194. And the Act expressly provides that courts should apply deferential standards of review to certain questions—"just none that apply to review of legal questions." *Id.* *Chevron* did not reconcile its presumption about congressional intent with these provisions; indeed, *Chevron* failed to mention them at all.

Even if Congress wanted to make agencies the "authoritative interpreter" of ambiguous statutes, the delegation of interpretive authority to agencies would violate the separation of powers. The Framers understood that the "interpretation of the laws is the proper and peculiar province of the courts" and that it "belongs to [judges] to ascertain ... the meaning of any particular act proceeding from the legislative body." The Federalist No. 78, at 467 (Clinton Rossiter ed., 1961). And of course, this Court has repeated time and again that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). But *Chevron* forces judges "to abandon

what they believe is the best reading of an ambiguous statute in favor of an agency's construction." *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (quotation marks omitted). Thus, *Chevron* "wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive." *Id.* (quoting *Marbury*, 5 U.S. at 177).

That transfer of core judicial power to administrative agencies fails for at least two reasons. First, Congress does not have the power to authoritatively interpret the laws, so "it cannot delegate that power to an agency." *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment); *accord Bowsher v. Synar*, 478 U.S. 714, 726 (1986). And second, Article III prevents Congress from stripping the courts of the judicial power and transferring it to another branch. *Stern*, 564 U.S. at 484. This Court should therefore hold that *Chevron* unconstitutionally transfers judicial power from the courts to administrative agencies.

C. *As the decision below shows,* Chevron *deference encourages agencies to rewrite even clear statutes, and encourages courts to abdicate their judicial role.*

In theory, courts extend *Chevron* deference only when a statute is ambiguous. And "the question whether a statute is ambiguous" is supposed to "arise[] after, not before, a court applies traditional canons of interpretation." *OfficeMax, Inc. v. United States*, 428 F.3d 583, 592 (6th Cir. 2005) (Sutton, J.). As this Court has explained, "[i]f the intent of Congress is clear, that is the end of the matter; for

the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43.

But that is not the way it works in practice. *Chevron* encourages agencies to rewrite even clear statutes. Agencies know that "their interpretive decisions will be reviewed under a deferential version of *Chevron*"; thus, they feel "free to disregard congressional intent and impose their own policy views even when it is possible to have at least a good sense of how Congress would have wanted the agency to act." Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 784 (2010).

Likewise, *Chevron* encourages judges to bless an agency's rewriting of clear statutory text. As Judge Kethledge has explained, interpreting complex statutes is often similar to walking through a cedar swamp:

> The statute presents a dense undergrowth of sections and subsections and subsections within those. The answer to the specific question in the case might lie somewhere in those sections and subsections, but working through them is hard. And meanwhile the agency is there to offer a path already cleared. ... And so in agency cases it often seems that the court pauses only briefly at step one, without much effort to hack through the undergrowth, before proceeding straightaway down the cleared path of step two.

Kethledge, *supra* at 324.

This case exemplifies those corrosive effects. First, the Fish and Wildlife Service rewrote key parts of the Endangered Species Act to impose its own policy views. And second, the Fifth Circuit panel extended *Chevron* deference to the Service's manipulation of the Act—without *any* meaningful analysis of the statutory text.

As relevant here, the Endangered Species Act provides that, after determining that a species is endangered, the Service must "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i). The Act also provides that the Service cannot designate "specific areas outside the geographical area occupied by the species" unless that area is "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

Even a brief review of these provisions would have made clear that land can be designated as "critical habitat" only if it is, in fact, "habitat." *Id.* § 1533(a)(3)(A)(i); *see Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 640 (5th Cir. 2017) (Jones, J., dissenting from denial of rehearing en banc). Likewise, a brief review of the Act would have made clear that land cannot be "*essential* for the conservation of the species" unless it plays *some role* in the conservation of that species. 16 U.S.C. § 1532(5)(A) (emphasis added); *see Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482–91 (5th Cir. 2016) (Owens, J., dissenting).

Emboldened by *Chevron*, however, the Service designated Unit 1 as critical habitat—even though

the dusky gopher frog did not live there, could not live there, and almost certainly would not live there in the future. That designation effectively deleted the words "habitat" and "essential for the conservation of the species" from the Act.

Moreover, the Service's deletion of these words led to absurd results. The Service's interpretation meant that land could be designated as "critical habitat" even though it was uninhabitable—what Judge Jones dubbed "the oxymoron of uninhabitable critical habitat." *Markle*, 848 F.3d at 644 (Jones, J., dissenting from denial of rehearing en banc). And the Service's interpretation meant that land could be "essential for the conservation" of the dusky gopher frog even though the frog would die if it was moved there. *Markle*, 827 F.3d at 480 (Owens, J., dissenting).

To mitigate this absurdity, the Service imposed two limitations on its reading of the Act—namely, that Unit 1 contained at least one feature that was critical to the frog's survival, and that this critical feature was rare and difficult to reproduce. *See id.* at 471, 472 n.20 (majority op.). Neither of these limitations, however, were grounded in the statutory text. *See Markle*, 848 F.3d at 651 (Jones, J., dissenting from denial of rehearing en banc).

Under this Court's precedents, the Fifth Circuit panel should have struck down the Service's rewriting of the Act. It is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). Yet that is

precisely what the Service did here—it rewrote the critical-habitat provisions so it could regulate land that is uninhabitable by the dusky gopher frog. Moreover, the Service's invention of two atextual limits on its own absurd reading of the statute "should have alerted [the Service] that it had taken a wrong interpretive turn." *Id.* Indeed, "[a]gencies are not free to adopt unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness." *Id.* (ellipsis and quotation marks omitted).

Although the Fifth Circuit panel should have invalidated the Service's interpretation, the panel deferred to that interpretation under *Chevron* without doing *any* meaningful analysis of the statutory text. For example, take the panel's discussion of the word "essential." The panel first quoted the relevant statutory provision, which provides that the Service cannot designate unoccupied areas as critical habitat unless they are "essential for the conservation of the species." *Markle*, 827 F.3d at 464 (quoting 16 U.S.C. § 1532(5)(A)(ii)). The panel then noted that Congress had not defined the word "essential." *Id.* Finally, without doing any further analysis of the statute's text, the panel concluded that Congress must have "delegated to the Secretary the authority to make that determination." *Id.* As the panel later put it: "Congress has not defined the word 'essential' in the [Endangered Species Act]. Hence the Service has the authority to interpret the term." *Id.* at 467.

The panel's analysis of the word "habitat" was even less rigorous. The panel first acknowledged the petitioners' argument that "Unit 1 is not currently

habitable by the frog." *Id.* at 468. The panel then dismissed the argument, stating that "[t]here is no habitability requirement in the text of the [Endangered Species Act]." *Id.* But the panel did not even *mention* 16 U.S.C. § 1533(a)(3)(A)(i), which provides that, after determining that a species is endangered, the Service must "designate any *habitat* of such species which is then considered to be critical habitat." (Emphasis added.) Nor did the panel attempt to define the word "habitat" or conclude that the word was ambiguous, before deferring to the Service's interpretation.

In short, the Fifth Circuit panel took one look at the "dense undergrowth of sections and subsections" in the Endangered Species Act, and headed straight for the "path already cleared" by the Service. Kethledge, *supra* at 324. That path may have been easier to walk down, but the Constitution's separation of powers requires more.

II. In light of these constitutional problems, the Court should overrule *Chevron* or—at the very least—take steps to mitigate its most pernicious effects.

Over the past few years, more than one justice has raised "serious questions about the constitutionality of [the Court's] broader practice of deferring to agency interpretations of federal statutes." *Michigan*, 135 S. Ct. at 2712–14 (Thomas, J., concurring); *accord Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). The Center believes that the Court should address those questions and hold that *Chevron* deference violates

the separation of powers. At the very least, however, the Court should take steps to mitigate *Chevron*'s most pernicious effects.

This case offers the Court the opportunity to take three such steps. First, the Court should reiterate that, before extending *Chevron* deference, courts must perform a rigorous analysis that uses all the traditional tools of statutory interpretation. Second, the Court should announce that *Chevron* deference does not extend to statutes that press the limits of the nondelegation doctrine. And third, the Court should reiterate that *Chevron* deference does not extend to agency actions that invoke the outer limits of Congress's enumerated powers.

A. *Courts should not extend* Chevron *deference without first performing a rigorous statutory analysis.*

This case exemplifies one of *Chevron*'s most pernicious effects—the encouragement of courts to bless an agency's rewriting of clear statutory text. *See supra* Part I.C. The Court should make clear that *Chevron* does not permit such an abdication of the judicial role.

This Court has previously explained that, before extending *Chevron* deference, courts must use all the "traditional tools of statutory construction" to determine whether "Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9. If so, "that intention is the law and must be given effect." *Id.*

Despite these instructions, many courts—like the Fifth Circuit panel here—"pause[] only briefly at step one, without much effort to hack through the

undergrowth, before proceeding straightaway down the cleared path of step two." Kethledge, *supra* at 324. Such an approach necessarily increases the number of times that courts defer to an agency's interpretation, and therefore exacerbates *Chevron*'s violation of the separation of powers.

To address this problem, the Court should reiterate that courts must perform a much more rigorous statutory analysis before extending *Chevron* deference. For example, the Fifth Circuit panel mistakenly believed that *Chevron* deference was appropriate simply because Congress left a word undefined. *See Markle*, 827 F.3d at 464, 467. The Court should correct that mistake, and reiterate that, "[w]hen a term goes undefined in a statute," courts must first "give the term its ordinary meaning" rather than jumping straight to *Chevron*. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012).

In addition, the Court should explain that "*Chevron* does not require anything like complete certainty about Congressional intent in order to decide an issue at step one." Patrick J. Smith, *Chevron's Conflict with the Administrative Procedure Act*, 32 Va. Tax Rev. 813, 839 (2013). Of course, it is impossible to define precisely when a statute is ambiguous enough to require *Chevron* deference. But that does not mean that the Court cannot provide more concrete guidance. For example, the Court should clarify that a statute like the Endangered Species Act is not ambiguous simply because it "is complicated, even very complicated." Kethledge, *supra* at 319.

As Justice Scalia explained, a judge "who finds *more* often ... that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists." Scalia, *supra* at 521. Because Justice Scalia took that approach, it was "relatively rare that *Chevron* ... require[d] [him] to accept an interpretation which, though reasonable, [he] would not personally adopt." *Id.* This Court should encourage lower courts to take the same approach. Doing so would not cure *Chevron*'s violations of the separation of powers, but it would encourage courts to rigorously use their judicial power to "say what the law is," rather than outsourcing that task to administrative agencies.

B. *Courts should not extend* Chevron *deference when the statute at issue presses the limits of the nondelegation doctrine.*

This case also exemplifies how the combination of *Chevron* deference and a permissive nondelegation doctrine can seriously undermine the separation of powers.

Chevron is built on two closely related presumptions. First, when a statute is ambiguous, Congress wants the agency "to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 740–41 (1996). And second, "the more discretion Congress gives the agency, the more deference courts should give to agency interpretations of law." Thomas W. Merrill, *Rethinking Article I, Section 1: From*

Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2172 (2004). In combination, these two presumptions mean that, "the more discretionary (less clear) the statute, the more power flows to the agency." *Id.* at 2181 n.292.

In theory, the nondelegation doctrine would seem to place a limit on these presumptions. After all, the "premise of the nondelegation doctrine ... is that the more discretion Congress gives the agency, the closer Congress comes to acting unconstitutionally, and hence the more important it becomes that the courts either supply a narrowing construction of the statute or remand the matter to Congress." *Id.* at 2172. As a practical matter, however, this Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (quotation marks omitted). Consequently, both *Chevron* and the nondelegation doctrine shift power in the same direction—toward the administrative state. The result is a "potent mix" of legislative, executive, and judicial power. *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring).

Ideally, the Court would address this problem by overruling the *Chevron* doctrine *and* reinvigorating the nondelegation doctrine. At a minimum, however, the Court should refuse to apply *Chevron* and the permissive nondelegation doctrine at the same time. When Congress delegates a large amount of policymaking authority to an agency, "how much leeway judges give to administrative exercises of discretion is critically important." Ronald A. Cass,

Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion, 83 Geo. Wash. L. Rev. 1294, 1298–99 (2015). Indeed, the standard of review is "effectively the last opportunity for law to constrain official power." *Id.* Thus, when a statute gives largely unbridled discretion to an agency, courts should refuse to defer to the agency's interpretation of that statute. Instead, courts should exercise the full scope of their judicial power to seek the statute's objective meaning.

To be sure, some statutes provide little to no guidance about which policy goals the agency should pursue, making it difficult, if not impossible, to determine the statute's objective meaning. *See Dep't of Transp.*, 135 S. Ct. at 1251 (Thomas, J., concurring in the judgment) (collecting cases in which Congress provided a minimal degree of specificity). But that does not mean that courts should defer to the agency's exercise of policymaking authority. On the contrary, the court's duty in such a case is to refuse to enforce the statute on the ground that "[a]n unintelligible text is inoperative." Antonin Scalia & Bryan A. Garner, *Reading Law* 134 (2012). Congress would then have the opportunity to clarify the statute—thus preserving our system of separated powers.

This case provides an apt example of this problem. In the Service's view, the Endangered Species Act provides that "virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the

species on it." *Markle*, 827 F.3d at 483 (Owens, J., dissenting). For the reasons explained in Part I.C, the Center believes that the Act's grant of authority is much more limited. If the Service's view is correct, however, then the Act would give the Service "unfettered discretion to designate land as 'critical habitat' so long as scientists agree that uninhabitable land can be transformed into habitat." *Id.* at 488. That is a staggering amount of discretion, and it is inconsistent with the separation of powers. As a result, the Court should refuse to extend *Chevron* deference and, if necessary, refuse to enforce the Act as unintelligible.

C. *Courts should not extend* Chevron *deference when the agency's action invokes the outer limits of Congress's enumerated powers.*

Finally, this case exemplifies the danger of allowing an agency to stretch a statute beyond the limits of Congress's enumerated powers. As explained below, the application of the Endangered Species Act to noncommercial, wholly intrastate species such as the dusky gopher frog raises substantial constitutional questions about the scope of the Commerce Clause. The Service then *extended* the Act's reach by designating Unit 1 as "critical habitat," even though the frog does not and cannot live there. That unlawful extension does not deserve *Chevron* deference.

When an agency's interpretation of a statute "invokes the outer limits of Congress' power," this Court "expect[s] a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook*

Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001). That clear-statement rule is based on the Court's "prudential desire not to needlessly reach constitutional issues and [its] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172–73. Thus, when an agency's interpretation of a statute would raise "serious constitutional problems," this Court "will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 173 (quotation marks omitted). In doing so, the Court will "not extend *Chevron* deference" to the agency's interpretation. *Id.* at 172.

This case involves, at the very least, the outer limits of Congress's power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Under this Court's precedents, the Commerce Clause allows Congress to regulate "the use of the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000). Although this power is expansive, it remains "subject to outer limits." *United States v. Lopez*, 514 U.S. 549, 557 (1995). For example, the Commerce Clause applies only to pre-existing activity. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 550–51 (2012) (opinion of Roberts, C.J.); *id.* at 649–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). And that pre-existing activity must be "economic." *Lopez*, 514 U.S. at 559–60.

Here, the Service's designation of Unit 1 as "critical habitat" raises substantial constitutional questions regarding Congress's commerce power. The designation of Unit 1 plainly does not count as a regulation of "the use of the channels of interstate commerce." *Morrison*, 529 U.S. at 609. And the designation of Unit 1 cannot be sustained as a regulation of "things in interstate commerce." *Id.* As the Service acknowledges, the dusky gopher frog "is currently known to occur only within the State of Mississippi," and has no economic value. 77 Fed. Reg. 35118, 35120, 35127. Unsurprisingly, therefore, there is no commerce involving the frogs.

The Fifth Circuit panel upheld the Service's designation, however, as a regulation of activities that substantially affect interstate commerce. *Markle*, 827 F.3d at 475. But the panel's analysis was misguided at best.

The panel framed the question presented as "whether the *federal action* substantially affects interstate commerce." 827 F.3d at 475 (emphasis added) (brackets and quotation marks omitted). To answer that question, the panel analyzed whether "*the designation of Unit 1*" was "economic or commercial in nature." *Id.* at 476 (emphasis added). But the issue was not "whether the challenged *regulation* substantially affects interstate commerce"; it was "whether the *activity being regulated* does so." *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (emphasis added). Thus, the panel never addressed the relevant question—whether the activity being

regulated substantially affects interstate commerce. And the answer to that question is far from clear.

To take one example, it is not clear what activity the Service was regulating when it designated Unit 1 as critical habitat. In most cases involving the Endangered Species Act, the regulated activity at issue is the "tak[ing] of any endangered species without a permit or other authorization." *See People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 995 (10th Cir. 2017) (citing 16 U.S.C. § 1538(a)(1)(B)). But here, there are no dusky gopher frogs to "take" in Unit 1—the frogs do not and cannot live there.

To be sure, the word "take" includes the concept of "harm," 16 U.S.C. § 1532(19), which the Secretary of the Interior has interpreted as including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering," 50 C.F.R. § 17.3. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995). But the Service has not identified any activity that "actually kills or injures" the dusky gopher frog because, once again, the frog does not and cannot live in Unit 1.

Perhaps the Service would say that it is regulating any activities that would trigger the Act's consultation process, *see* 16 U.S.C. § 1536, and that regulating those activities is an "essential part[] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales v. Raich*, 545 U.S. 1, 24–25 (2005) (quotation marks

omitted). But it is difficult to see how the designation of Unit 1 is "essential" to the Endangered Species Act, given that the dusky gopher frog does not and cannot live there.

Because "the precise object or activity that, in the aggregate substantially affects interstate commerce" is "not clear," the Service's designation of Unit 1 raises "significant constitutional questions." *Solid Waste Agency*, 531 U.S. at 173–74. Thus, this Court should "not extend *Chevron* deference here." *Id.* at 172.

CONCLUSION

The Framers understood that the "separation of governmental powers into three coordinate Branches is *essential* to the preservation of liberty." *Mistretta*, 488 U.S. at 380 (emphasis added). As this case shows, however, *Chevron* deference is eroding this fundamental principle of American government. The Court should take this opportunity to overrule *Chevron* or—at the very least—take whatever steps it can to limit the damage.

Respectfully submitted,

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